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ONE

IN THE  
SUPREME COURT OF THE UNITED STATES

MARCH TERM, 1988

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT, NO. 87-1538

Supreme Court, U.S.  
FILED

MAR 16 1988

JOSEPH F. SPANIOL, JR.  
CLERK

TYRONE VICTOR HARDIN,

Petitioner,

v.

DENNIS STRAUB, WARDEN  
SOUTHERN MICHIGAN PRISON,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

RECEIVED

APR 16 1988

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

NOW COMES the Petitioner, Tyrone Victor Hardin, acting as his own attorney in pro se, and for his Motion to proceed in forma pauperis, states unto this Honorable Court as follows:

1. That on December 29, 1986, an Order granting Petitioner's Petition to Proceed in forma pauperis was granted by Magistrate Paul Komives of the United States District Court, Eastern District of Michigan, Southern Division.

WHEREFORE, your Petitioner respectfully request that this Honorable Court grant Petitioner's Motion to Proceed In Forma Pauperis, pursuant to Rule 46.

Respectfully submitted,

BY:

*S. J. [Signature]*  
TYRONE VICTOR HARDIN pro se  
(136097)  
Petitioner-Appellant  
777 W. Riverside Drive  
Ionia, Michigan 48846

Dated: March 30 1988

No.

ORIGINAL

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IN THE  
SUPREME COURT OF THE UNITED STATES

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MARCH TERM, 1988

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT, NO. 87-1538

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TYRONE VICTOR HARDIN,

Petitioner,

v.

DENNIS STRAUB, WARDEN,  
SOUTHERN MICHIGAN PRISON.

Respondent.

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AFFIDAVIT IN SUPPORT OF  
MOTION TO PROCEED IN FORMA PAUPERIS

---

I, Tyrone Victor Hardin, being first duly sworn, deposes and says that I am the petitioner in the above-entitled cause; that in support of my motion to proceed without being required to prepay fees, cost or give security thereof, I state that because of my poverty I am unable to pay the costs of this case or give security thereof; and I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? "NO"
  - a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

- b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received.  
My last date of employment was: 12/2/87, and I received approximately \$374
2. Have you received within the past twelve months any income from a business, profession or other form of self employment, or in the form of rent payments, interest, dividends or other sources? "NO"
- a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.
3. Do you own any cash or checking or savings accounts? "NO"
- a. If the answer is yes, state the total value of items owned.
4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? "NO"
5. List the persons who are dependent upon you for support and state your relationship to those persons.  
"Wife and four(4) children."

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

VERIFICATION

STATE OF MICHIGAN }  
COUNTY OF WASHTENAW ) ss.

Tyrone Victor Hardin  
Tyrone Victor Hardin (138097)

Subscribed and sworn to before me  
this 6 day of April, 1988

Evelyn Broadus  
Notary Public EVELYN P. BROADUS  
Notary Public, Washtenaw County, MI  
My Commission Expires Oct. 1, 1990

My Commission expires:

No.

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Respondent.

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PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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TYRONE VICTOR HARDIN (136097)  
777 W. Riverside Drive  
Ionia, Michigan 48846

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QUESTION PRESENTED FOR REVIEW

I.

WHETHER THE SIXTH CIRCUIT COURT OF APPEAL  
COMMIT REVERSIBLE ERROR IN DETERMING THAT  
THE STATUTE OF LIMITATIONS WHICH TOOLS  
THE LIMITATION PERIOD FOR PERSONS THAT ARE  
INCARCERATED DOES NOT APPLY IN 42 USC 1983  
CIVIL ACTIONS, AND THE SIXTH CIRCUIT COURT  
OF APPEALS FAILING TO CONSIDER THE TIME  
IN WHICH PETITIONER DISCOVERED THAT HE HAD  
A CAUSE OF ACTION FOR VIOLATIONS OF HIS  
RIGHTS GUARANTEED TO HIM UNDER THE FIFTH,  
EIGHTH AND FOURTEENTH AMENDMENT OF THE  
CONSTITUTION OF THE UNITED STATES OF  
AMERICA ?

### LIST OF PARTIES

The parties in this proceeding, in the United States Court of Appeals for the Sixth Circuit, were as follows:

1. TYRONE VICTOR HARDIN,  
Petitioner-Appellant.
2. DENNIS STRAUB, WARDEN  
SOUTHERN MICHIGAN PRISON  
RESPONDENT-APPELLEE.

The Attorney General's office did not participate in this cause of action.



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No.

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UNITED STATES COURT OF APPEALS  
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TYRONE VICTOR HARDIN,  
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DENNIS STRAUB, WARDEN,  
SOUTHERN MICHIGAN PRISON,  
Respondent.

---

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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The Petitioner, Tyrone Victor Hardin, acting as his own attorney in pro se., prays that a Writ of Certiorari issue to review the December 18, 1987 decision and order of the United States Court of Appeals for the Sixth Circuit which affirmed the United States District Court for the Eastern District of Michigan, Southern Division, Order and Decision dismissing Petitioner's 42 USC §1983 complaint which was further denied by the Sixth Circuit's denial of Petitioner's Petition for Rehearing en banc, in an Order filed on February 18, 1988.

## OPINIONS AND ORDERS BELOW

The Memorandum Opinion and Order of the United States District Court for the Eastern District of Michigan, Southern Division, is unreported and omitted in this appeal.

The Opinion of the United States Court of Appeals for the Sixth Circuit is set forth in Appendix A herein. The Order denying Petition for Rehearing en banc is set forth in Appendix B herein.

### JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 18, 1987. An Order denying Petitioner's Petition for Rehearing en banc was filed on February 18, 1988 by the Court of Appeals for the Sixth Circuit. The mandate denying Petitioner's Rehearing en banc by the United States Court of Appeals for the Sixth Circuit was issued by the Sixth Circuit on February 18, 1988. The time for filing a Petition for Writ of Certiorari continues to May 17, 1988, pursuant to 28 USC § 2101(C). The jurisdiction of the United States Supreme Court is invoked under Title 28 USC § 1254 (1). Petitioner also relies upon the United States Constitution, Amendments One and Fourteen, Section 1. (See Appendix C).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 USC § 1254 (1). (Court of Appeals; certiorari; appeal; Appendix C-1, infra).

28 USC §2101 (c). (Supreme Court; time for appeal or certiorari; docketing stay) (Appendix C-1, infra).

42 USC §1983 (United States Code) (Appendix C-1, infra).

## STATEMENT OF THE CASE

Petitioner Tyrone Victor Hardin, filed a 42 USC §1983 civil suit in the United States District Court on December 29, 1986, alleging that his Fifth, Eighth and Fourteenth Amendment rights were violated when he was placed in Administrative Segregation on October 24, 1980, by the Respondent herein, without affording him a hearing prior to or after placement in segregation.

Petitioner further alleged that he was subjected to cruel and unusual punishment while confined in segregation status at the Southern Michigan Prison.

On or about July 22, 1984, Petitioner was provided with a Rule Book of the Michigan Department of Corrections, which explained the procedures to be followed when a prisoner is placed in Administrative segregation.

On September 11, 1985 Petitioner filed for a copy of his classification report, and at which time he discovered that he had been placed in Administrative Segregation, hereinafter referred to as Adm. Seg., for the good and well order of the institution. And it was at this time that Petitioner also discovered that the Respondent had violated his Constitutional Rights by failing to conduct a hearing prior to or after placement in Adm. Seg.

Petitioner submits to this Honorable Court that he is ignorant of the law and it was not until he received his classification reports that he discovered that he had a cause of action that would best be handled in the United States District Court i.e. being that his Constitutional Rights were violated by the Respondent herein.



On February 4, 1987, The United States District Court Judge Honorable Robert E. Demascio, issued an Order dismissing the Complaint as frivolous. Holding that Petitioner's Complaint is timed barred under the three (3) year Statute of Limitations and the court not considering the time in which the Petitioner discovered that he had a cause of action in the Federal Courts.

On March 10, 1987, Petitioner filed a Motion to Vacate the judgment dismissing his complaint. Arguing that the statute of limitations was tolled by reasons of his incarceration. Said Motion did not arrive for filing in time, due to prison officials delayed in mailing the Motion in question thus said Motion was denied as being untimely.

On May 28, 1987, Petitioner filed a Notice of Appeal to appeal to the United States Court of Appeals For The Sixth Circuit for the order and decision dismissing his complaint.

On July 14, 1987, Petitioner submitted his Brief on appeal to the Sixth Circuit Court of Appeals, arguing that the United States District Court errored when it dismissed his 42 USC §1983 Civil Right Complaint under the three (3) year Statute of Limitations, and that the limitation period was tolled for persons incarcerated in prison, and the fact that Petitioner did not discover that he had a cause of action until he had received a Rule Book and received copies of his classification report in 1986.

On December 18, 1987, the United States Court of Appeals for the Sixth Circuit issued an Order affirming the District Court's dismissal of Petitioner's complaint, without giving any considera-

tion to the time in which Petitioner discovered that he had a cause of action, and the Sixth Circuit holding that the Statute of Limitation which tolls the period is which a prisoner can sue under section 1983 is not applicable and the District Court was correct in dismissing Petitioner's claim. (See Appendix A-2 and 3) hereto annexed and filed herewith.

On December 29, 1987, Petitioner filed a Motion for Rehearing en banc, arguing that the state tolling statute is the appropriate statute, and that the Sixth Circuit did not consider the fact when Petitioner discovered that he had a cause of action for the Constitutional violations in which he incurred while unduly confined in Adm. Seg. (See Appendix B-1) hereto annexed and filed herewith.

## REASON FOR ALLOWANCE OF WRIT

### ARGUMENT I.

THE SIXTH CIRCUIT COURT OF APPEALS COMMITTED REVERSIBLE ERROR IN DETERMINING THAT THE STATUTE OF LIMITATION PERIOD FOR PERSONS THAT ARE INCARCERATED DOES NOT APPLY IN 42 USC §1983 CIVIL ACTIONS, AND THE SIXTH CIRCUIT COURT FAILURE TO CONSIDER THE TIME IN WHICH PETITIONER-APPELLANT DISCOVERED THAT HE HAD A CAUSE OF ACTION FOR VIOLATIONS OF HIS RIGHTS GUARANTEED TO HIM UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

Although the Sixth Circuit Court of Appeals found that the District Court was correct in dismissing the complaint under the three (3) years Statute of Limitations. It is the position of Petitioner that the courts erred in not applying the state tolling statute.

Petitioner contends that, in reaching its decision, the Court did not consider most, if not all the pertinent facts in this case or all the constitutional errors involved.

While it might be interesting to point out, that, although individuals are incarcerated in prison, they are still members of the public within the meaning of the constitution of the United States of America and that their access to the judicial process has been impaired due to the lack of adequate knowledge of the law, which in itself, accounts for over ninety five percent of the pro se complaints being dismissed from the court today. Which in essence is the very reason why prisoners should be given additional time to assert their claims in the courts i.e. due to the lack of adequate knowledge of the law, and/or

counsel to litigate their causes of actions in the courts.

Generally, in civil rights actions the court must look to state law for the statute of limitations which applies in analogous state cause of actions, since §1983 and §1985 do not contain their own limitation provision. citing Kilgore v. City of Mansfield, 679 F. 2d (1982).

In Board of Regents v. Tomanio, 446 U.S. 478, 100 S. Ct. 1790, 64 L. Ed 2d 440 (1980), This Court held: "the question of whether a limitation period is tolled is an inherent aspect of the state statute of limitations. Since Federal Court must look to the state for the statute of limitations in 1983 and 1985 actions, the courts are obligated to also apply state tolling statutes, as long as the result is not inconsistent with the constitution or Federal law."

Michigan tolling statute provides, in pertinent parts: If the person first entitled to . . . bring an action is . . . imprisoned at the time his claim accrued, he . . . shall have one after his disability is removed through death or otherwise, to . . . bring the action although the period of limitations has run.

To be deem a disability, the imprisonment must exist at the time the claim accrued. MCLA 600. 5851(1),(3); MSA 27A. 5851.

In Hawkins v. Justin, 109 Mich App. 743 (1981): The purpose of the statutory provision which tolls the limitations period in favor of persons imprisoned at the time of the accrual of their cause of action is to be recognized that persons in

prison are under disability in that their freedom has been restricted and their access to the judicial process has been impaired and to provide such persons with additional time to assert their legal rights. MCLA 600.5851; MSA 27A.5851.

The statute provision which tolls the limitation period in favor of persons imprisoned at the accrual of their cause of action provides for a disability in favor of all who are incarcerated when a cause of action accrues and does not require a showing of special disability. MCLA 600.5851; MSA 27A.5851.

In the case of Covington v. Winger, 562 F. Supp. 115 (1983) the federal District Court held in that case that "the limitations period would be tolled by plaintiff's incarceration." In contrast to the lower Federal Court's ruling in the instant case.

In Warren v. Bergeron, 831 F. 2d 101 (5th Cir. 1987) held: "No Federal Statute of limitation covers 42 USC 1983 civil rights claims; rather the law of the state in which the alleged action arose controls. 42 USC 1983. Miller v Smith, 625 F. 2d 43 (5th Circuit 1980) rev'g 615 F.2d 1037 (5th Cir 1980).

Petitioner submits that the lower federal courts did not apply the state tolling statute in the instant cause as mandated in Board of Regents supra,

Petitioner further contends that the lower federal courts did not give any consideration to the fact that a cause of action is tolled until such time that the injured party discovers or has reason to know that a injury has accrued.

In Town of Hooksett School Dist. v. W.R. Grace Co., 617 F. Supp. 126 (D.C.N.H. 1984), The court states: "The limitations



period will not begin to run against the Plaintiff until such time as he discovers, or in the exercise of reasonable diligence should have discovered, that he has been injured by the Defendants acts or omissions." See also EIMCO-BSP Service Co. v. Davison Construction Co., 547 F. Supp. 57, 59 (D.N.H. 1982); Drayden v. Needville Independent School District, 642 F. 2d 129 (5th Cir 1981).

In Warren v. Bergeron, supra, Stated: "A cause of action accrues on the date that a claimant either knows or should have known of his injury and its causal connection to the defendants acts.

While it is the position of the Petitioner that his access to the courts has been restricted by the failure of the lower courts to apply the state tolling statute, which precludes prisoner of the right to petition the United State Government for redress for constitutional violations under the First Amendment of the Constitution of the United States. The prohibiting the tolling statute in section 1983 civil actions, is in itself denies prisoners within its jurisdiction, the equal protection of the law guaranteed to them under the Fourteenth Amendment of the Constitution of the United States.

While it might be noted that it would be impossible to expect a pro se prisoner to bring a cause of action well within the mandated statute of limitations, especially when he lacks the legal capacity to petition the courts for a redress, vering in mind that persons in prison are under disability in that their freedom has been restricted and their access to the judicial process has been impaired due to the lack of adequate access to law

library and persons trained in the area of law to assist a pro  
se litigant with the meaningful filing of papers into the courts.

In Major v. Arizona State Prison, 642 F. 2d 311 (9th Cir. 1981), the Ninth Cir. Ct. of App. stated in pertinent parts: " a limitation period is tolled are dependent upon a determination of plaintiff's legal capacity to sue." No such determination was ever made in the instant cause as to Petitioner's legal capacity to sue or when Petitioner discovered his cause of action or had reason to know or should have known of his injury.

Substantial reasons have been propounded to this Court for the granting of a Writ of Certiorari with respect to this issue.

### CONCLUSION

For all the foregoing reasons, Petitioner Tyrone Victor Hardin, respectfully requests that the Petition for Writ of Certiorari be granted, or in the alternative, that the Opinion and Order of the United States Court of Appeals For The Sixth Circuit affirming the District Court's dismissal of his complaint be summarily reversed, or if the Petitioner's complaint is to be dismissed, it be dismissed without prejudice i.e. being that no judgment on the merits of the complaint was ever made, so to enable the Petitioner to relitigate his cause of action into the state court.

Respectfully submitted,

BY:

Tyrone Victor Hardin  
Tyrone Victor Hardin  
Petitioner, 777 W. River-  
side Dr., Ionia, MI 48846

Dated: March 3, 1986

FILED

DEC 18 1987

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

JOHN P. HEHMAN, Clerk

TYRONE VICTOR HARDIN,  
Plaintiff-Appellant,  
v.  
DENNIS STRAUB,  
Defendant-Appellee.

O R D E R

Appendix B

Before: WELLFORD, NELSON and BOGGS, Circuit Judges.

This pro se Michigan state prisoner appeals the district court's dismissal of his civil rights action, filed pursuant to 42 U.S.C. Section 1983. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and brief, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34.

Plaintiff alleged he was denied his fifth, eighth, and fourteenth amendment rights when he was placed in solitary confinement in 1980 and 1981 while incarcerated at the State Prison of Southern Michigan. The district court concluded that the suit was time-barred and dismissed it pursuant to 28 U.S.C. Section 1915(d).



**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

FEB 18 1988

## O R D E R

John P. Hehman  
John P. Hehman, Clerk

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

TYRONE VICTOR HARDIN,

Plaintiff,

v.

DENNIS STRAUB,

Defendant.

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Civil No. 86CV75355DT

Hon. Robert E. DeMascio

ORDER

3

ORDER

Plaintiff filed this pro se complaint pursuant to 42 U.S.C. § 1983. Plaintiff claims that he was placed in administrative segregation while incarcerated at the State Prison of Southern Michigan (SPSM) without a hearing as mandated in Michigan Department of Corrections Administrative Rule 791.4405. He requests monetary damages.

Plaintiff has been granted in forma pauperis status. Pursuant to 28 U.S.C. § 1915, a district court may sua sponte dismiss an in forma pauperis complaint before service on the defendants. Brooks v. Dutton, 751 F.2d 197, 199 (6th Cir. 1984). See also Spruyette v. Walters, 753 F.2d 498 (6th Cir. 1985), cert. denied 106 U.S. 788 (1986). The court may dismiss a case "if satisfied that the action is frivolous or malicious." Harris v. Johnson, 784 F.2d 222 (6th Cir. 1986). A complaint may be dismissed as frivolous only if "it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." Malone v. Colyer, 710 F.2d 258, 260-61 (6th Cir. 1983).

The actions plaintiff complains of took place while he was incarcerated at SPSM. The complaint alleges that plaintiff was confined at SPSM in 1980 and 1981 and was transferred to the Marquette Facility in July 1981. Plaintiff is essentially

alleging a personal injury under the civil rights statute which is governed by the Michigan three-year statute of limitations.

EEOC v. Detroit Edison, 515 F.2d 301, 315 (6th Cir. 1975);

Marlowe v. Fisher Body, 489 F.2d 1057, 1063 (6th Cir. 1973).

Since plaintiff did not file this action until December 29, 1986 it is time barred.

NOW, THEREFORE, IT IS ORDERED that the complaint be dismissed as frivolous, pursuant to § 1915(d).

  
Robert E. DeMascio  
United States District Judge

Dated: FEB 26 1987